

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

ZIMMERMAN V. ZIMMERMAN

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

LISA ZIMMERMAN, NOW KNOWN AS LISA NELSON, APPELLANT,

V.

JEFFREY ZIMMERMAN, APPELLEE.

Filed April 10, 2012. No. A-11-591.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

Abby Osborn, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Nicholas M. Froeschl, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Lisa Zimmerman, now known as Lisa Nelson, appeals from the district court's order changing physical custody of two of her children, arguing that the court abused its discretion in denying her request for a continuance after the withdrawal of her attorney. Because the record shows that Lisa (1) caused unnecessary delays in the proceedings and repeatedly failed to comply with court orders, (2) waited 1½ months after her attorney withdrew to request the continuance, and (3) failed to provide a supporting affidavit, the district court did not abuse its discretion in denying her request for a continuance. Accordingly, we affirm.

BACKGROUND

The district court for Platte County, Nebraska, dissolved the marriage of Lisa and Jeffrey Zimmerman in 2006 and awarded them joint legal custody of their six minor children. The court awarded Lisa the physical custody of Amber, born in 1992; Timothy, born in 1999; and Treyton,

born in 2001. Jeffrey was awarded physical custody of Tyler, born in 1991; Amanda, born in 1994; and Andrea, born in 1998.

In April 2010, Jeffrey filed an application for modification of the decree, alleging a significant change in circumstances and asking for alteration of the physical custody arrangement. He asked for the physical custody of Tyler, Andrea, Timothy, and Treyton and requested that Lisa have physical custody of Amber and Amanda. In response, Lisa filed a response and cross-complaint, requesting legal and physical custody of Amanda.

On January 18, 2011, Lisa's attorney filed a motion for leave to withdraw. The motion was not included in the appellate record, so the attorney's exact reasons for wishing to withdraw are unknown. The court granted leave to withdraw at a hearing on January 28, at which time it also scheduled trial on the application for modification and cross-complaint for March 17.

On March 10, 2011, Lisa filed a request for continuance with the district court. The request was in the format of a letter, the body of which stated:

I am submitting this request for a continuance as the plaintiff in the child custody case named above. The court has issued a trial date on March 17, 2011 at 9:00am. I have recently been without legal representation on January 28, 2011. I feel I haven't had ample time to gain funds for new representation until now. I have found an attorney in Omaha, Ne. willing to provide counsel but they feel they don't have enough time to prepare for trial. I am respectfully asking for a 60 day continuance to give my newly acquired attorney time to prepare.

The Omaha attorney never entered an appearance for Lisa, and she never provided the court with the name of any successor attorney.

The district court considered Lisa's request for a continuance at the beginning of trial on March 17, 2011. Jeffrey objected to the motion, citing the cost and time of preparing for and appearing at trial. The district court overruled the motion, stating:

This case has been on file, at least the modification proceedings, for almost a year. . . . There has been noncompliance with the previous orders of the [c]ourt regarding completion of the parenting education class. [Lisa] now tells the [c]ourt that she's completed that requirement, albeit, just yesterday, so almost a year to deal with the [c]ourt's previous order in conformance with the Parenting Act. In addition, the [c]ourt will notice the many hearings we've had in this case that involve [Lisa's former attorney] and his representations that he was unable to get his then-client, [Lisa], to comply with the mediation requirements.

So there comes a point, because custody of children is involved in this case, that the matter has to go to trial to resolve issues that may be pertinent to their best interests and the [c]ourt cannot allow litigation to be endlessly prolonged in an attempt to avoid trial. So the motion to continue, filed by [Lisa] on March 10, 2011, will be overruled.

The parties then proceeded to trial on the application for modification and cross-complaint, with Lisa representing herself.

In May 2011, the district court issued a modification order, changing the physical custody of Timothy and Treyton from Lisa to Jeffrey. The court also dismissed Lisa's cross-complaint and ordered that the physical custody of Amanda remain with Jeffrey. Lisa subsequently filed a

motion for new trial, arguing that the court's denial of her motion for a continuance forced her to represent herself at trial, which she was not able to do "in an effective manner." This motion was prepared by an attorney. A hearing was held on the motion for new trial in June, at which hearing Lisa was represented by counsel. The court later overruled the motion for new trial in a written order.

Lisa timely appeals.

ASSIGNMENTS OF ERROR

Lisa alleges that the district court abused its discretion (1) in denying her request for a continuance and (2) in overruling her motion for new trial.

STANDARD OF REVIEW

A motion for a continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003). The same standard of review applies to a motion for new trial. See *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012). A judicial abuse of discretion exists when a judge, acting within effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result. *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).

ANALYSIS

There are three analytical factors that must be considered when determining whether a court abused its discretion in denying a request for a continuance: (1) the number of continuances granted to the moving party, (2) the importance of the issue presented in the matter, and (3) whether the continuance was being sought for a frivolous reason or a dilatory motive. See, *Weiss v. Weiss*, 260 Neb. 1015, 620 N.W.2d 744 (2001); *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995); *Velehradsky v. Velehradsky*, 13 Neb. App. 27, 688 N.W.2d 626 (2004).

The record in the instant case indicates that Lisa was not granted any continuances during the pendency of this case, that the custodial issue presented was one of great importance, and that Lisa's stated reason for requesting a continuance was to give her new counsel time to prepare for trial. Absent other considerations, one might conclude that the district court should have granted Lisa's request for a continuance.

However, there are several additional facts which lead us to conclude that the district court did not abuse its discretion in denying Lisa's request for a continuance: Lisa's history of causing unnecessary delay in these proceedings, her decision to wait for 1½ months after her attorney withdrew to request a continuance, and her failure to comply with the statutory requirements for a request for a continuance.

First, the record shows that Lisa repeatedly caused unnecessary delays throughout these proceedings. Although the district court ordered Lisa and Jeffrey to complete parenting classes in May 2010, Lisa waited to comply with this order for over 10 months and gave no explanation for the delay except that she had "a very busy schedule." She also failed to comply with the requirement to engage in mediation under Neb. Rev. Stat. § 42-364 (Cum. Supp. 2010), which

led the district court to waive the requirement after several months of waiting for her to respond to the Nebraska Justice Center's attempts to set up mediation. The record also suggests that this refusal to comply with mediation may have caused Lisa's attorney's withdrawal. When asked about her failure to attend mediation, Lisa stated, "They didn't tell me I was supposed to show up."

In *Adrian v. Adrian*, *supra*, and *Weiss v. Weiss*, *supra*, the Nebraska Supreme Court found that it was an abuse of discretion to deny a request for a continuance partially because it concluded that the party requesting the continuance did not unnecessarily delay the proceedings. Because the absence of unnecessary delay was pertinent to the finding that it was an abuse of discretion to deny the request for a continuance in *Adrian* and *Weiss*, we find that the existence of unnecessary delay in the instant case supports the opposite conclusion. Although it was an unpublished opinion, we have previously found no abuse of discretion in denying a request for a continuance when the party caused unnecessary delays in the proceedings. See *Anderson v. Anderson*, No. A-02-809, 2003 WL 21398219 at *5 (Neb. App. June 17, 2003) (not designated for permanent publication) (stating that we would probably conclude continuance should have been granted if deciding merits of continuance only upon considerations used in *Weiss* and *Adrian*, but that "the facts in this case raise serious issues of whether [the party requesting a continuance] has caused unnecessary delays and whether he was taking advantage of the delays").

Second, Lisa's request for a continuance itself was filed unnecessarily close to the time of trial. Even though Lisa knew of her attorney's withdrawal on January 28, 2011, she did not file a request for a continuance until March 10--1 week before trial. In her request, she explained that she did not have "ample time to gain funds for new representation until now." Although she may have meant this as an excuse, her citation to financial trouble only highlights that Lisa knew much earlier than March that she would have difficulty obtaining new counsel. She could have filed for a continuance much sooner and should have done so.

Finally, the request for a continuance was not in compliance with Neb. Rev. Stat. § 25-1148 (Reissue 2008). Under this statute, an application for a continuance

shall be by written motion entitled in the cause or proceeding and setting forth the grounds upon which the application is made, which motion shall be supported by the affidavit or affidavits of person or persons competent to testify as witnesses under the laws of this state, in proof of and setting forth the facts upon which such continuance or adjournment is asked.

Lisa's application was not a proper motion and was not supported by affidavit. Failure to comply with the requirements of § 25-1148 by itself does not invalidate a motion for a continuance, but it is "a factor to be considered in determining whether a trial court abused its discretion in denying a continuance." *Velehradsky v. Velehradsky*, 13 Neb. App. 27, 32, 688 N.W.2d 626, 630 (2004).

For all of these reasons, we find that the district court did not abuse its discretion in denying Lisa's request for a continuance. Her first assignment of error lacks merit.

In her second assignment of error, Lisa argues that the district court abused its discretion in overruling her motion for a new trial, which motion was based on the denial of her motion for continuance. Having found that the district court's refusal to grant a continuance was not an

abuse of discretion, it necessarily follows that the denial of the motion for new trial based on the same ground was not an abuse of discretion.

CONCLUSION

Because Lisa's request for a continuance was not in compliance with § 25-1148, because she waited for 1½ months after her attorney withdrew to request a continuance, and because the record shows that she caused unnecessary delays in the proceedings and repeatedly failed to comply with court orders, the district court did not abuse its discretion in denying her request for a continuance or in denying the motion for new trial based on the denial of the motion for continuance. We affirm.

AFFIRMED.